to decide whether a regulation infringes upon rights protected by the first amendment is sufficiently specific in a regulation to convey notice to students or people in general of what is prohibited.'" *Nitzberg*, 525 F.2d at 383, *quoting Jacobs v. Board of School Commissioners*, 490 F.2d 601 (7th Cir. 1973), *vacated as moot*, 420 U.S. 128 (1975). A First Amendment proviso was not enough; instead, the provision would have to "detail the criteria by which an administrator" would make the decision, in advance. *Id.* This was so even though -- as is the case for the FCC under the *WAIT* decision -- the administrator had to "state his reasons" for denying the permit "in writing," and the decision to deny the permit had to be decided within 3 days by a higher-level administrator who also had to "stat[e] his reasons in writing." *Nitzberg*, 525 F.2d at 381. Post hoc rationalizations for denying a permit, no matter how elaborate, cannot substitute for adequate predetermination guidelines.

Waiver mechanisms without clear criteria do not suffice even when they contain explicit First Amendment exceptions. For example, in *Dambrot v. Central Michigan University*, 55 F.3d 1177, 1183 (E.D. Mich. 1993), the University adopted a code banning hostile-environment racial harassment, and included with it a proviso that "the University will not extend its application of discriminatory harassment so far as to interfere impermissibly with individuals' right to free speech." The Court found that this boilerplate provision did not provide adequate safeguards. Similarly, in *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989), a court invalidated a sexual harassment code, even though "[t]he university repeatedly argued that the Policy did not apply to speech that is protected by the First Amendment," *id.* at 864, and had refused to apply its harassment policy to one of the students who had been accused under it based on its finding that the particular speech at issue

was protected by the First Amendment. *Id.* at 865. The court held that the University could not avoid the First Amendment problem through an ad hoc First Amendment exception to its policy. Similarly, the Supreme Court has held that speech regulations are made more unconstitutional, not less, through ad hoc, ill-defined "safe harbor" provisions, since they can lead to discriminatory enforcement. *See also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-51 (1991) (while attorney could have been disciplined for disruptive speech, his discipline nevertheless had to be overturned because he had been misled by vague bar rules into thinking that his disruptive speech fell within a "safe harbor" provision; "the prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement. . .The question is not whether discriminatory enforcement occurred here, and we assume it did not, but whether the rule is so imprecise that discriminatory enforcement is a real possibility.").

The FCC's Class D regulations also lack the procedural safeguards required for a permitting system by *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990), because there is no specified and reasonable period of time in which a waiver must be issued, and there is no provision for prompt judicial review. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990) ("the licensor must make the decision whether to issue the license within a reasonable time period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the even that the license is erroneously denied"); *Nitzberg*, 525 F.2d at 384 (where initial review of adverse decision would be decided within 3 days, but subsequent decisions had no time limits, review was not "prompt and adequate").

The FCC need not act on a waiver within any specified period of time. *See* 47 C.F.R. § 73.3573 (providing procedures for processing FM broadcast station applications); 47 C.F.R. § 1.3 (waiver provision). And while an applicant for a waiver could eventually appeal the agency's denial to the D.C. Circuit, 47 U.S.C. § 402(b)(1), this is insufficient, since the availability of even immediate appeal -- if not expedited -- was deemed insufficient in *FW/PBS*. *See FW/PBS*, 493 U.S. at 248 (Scalia, J., dissenting) ("no one suggests that licensing decisions are not subject to immediate appeal to the courts").

FCC's blanket regulatory ban on microbroadcasting does not further significant governmental interests in any direct and material way: Exclusion of low-power radio stations with beneath 100 watts, but not over 100 watts, is inconsistent and belies the interest in spectrum scarcity that the FCC purports to be responding to in banning micro broadcasting. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993)("It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest "of the highest order" . . . when it leaves appreciable damage to that supposedly vital interest unprohibited'"), *quoting The Florida Star v. B.J.F.*, 491 U.S. 524, 541-542 (1989) (Scalia, J., concurring) (law banning news media, but no one else, from disclosing names of rape victims, is so underinclusive that it shows that the goal behind the law was not a compelling interest); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) ("[E]xemptions and inconsistencies" in alcohol labeling ban "bring into question the purpose of the. . .ban," such that it cannot be said to effectively promote substantial state interest it purports to serve). While the FCC is entitled to reasonable deference, this does not mean that its factual findings must be accepted as gospel.

The ban on micro radio also cannot survive even as a time, place, manner restriction on speech because it leaves Szoka without ample alternative means of communicating with his audience: *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1991) ("An alternative [means of communication] is not ample if the speaker is not permitted to reach the 'intended audience.'") -- intended target audience can't be reached by Szoka without his micro radio station, and many niche markets are deprived of radio programming because of the FCC's refusal to license the only broadcasters who would find it profitable to reach them: micro broadcasters. Attached to Szoka's declaration as Exhibit B is a lengthy list of e-mails from Jerry's fans, attesting to irreplaceability of his station's programming and the services it provides to HIV sufferers, among others. See Szoka Dcl. at Ex. B, quoting David Ooten ("they are doing a great job of serving the community"), J.P. Ratajczak ("It's the only one of its kind in that it provides commercial free music"), Douglas C. Buehl ("I have worked with HIV/AIDS persons and this format allows them to enjoy music of their past and their culture. This is important for them because many of them cannot go out to the clubs or out of the house at all."), and greystarn@email.msn.com (listeners "find comfort knowing that they are listening to a station that is friendly to their sexual orientation."); Szoka Dcl. at ¶¶ 5-10.

Court deference to the FCC's predictive judgments is not infinite, and the FCC's policies must be revisited when they are shown, or conceded, to lack an empirical basis. *See Bechtel v. F.C.C.*, 10 F.3d 875, 880 (D.C. Cir. 1993) (overturning the FCC's policy of giving a large preference to applicants who integrate ownership and operation of the licensee station) ("Despite its twenty-eight years of experience with the policy, the Commission had accumulated no evidence to indicate that it achieves even one of the benefits that the

Commission attributes to it. As a result, the Commission ultimately rests its defense of the integration criterion on the deference that we owe to its 'predictive judgments.' But as Bechtel protests, the relevant predictions have now had almost three decades to succeed or fail. There comes a time when reliance on unverified predictions begins to look a bit threadbare. 'The Commission's necessarily wide latitude to make policy based on predictive judgments deriving from its general expertise implies a correlative duty to evaluate its policies over time to see whether they work -- that is, whether they actually produce the benefits the Commission originally predicted they would.'"); *Schurz v. F.C.C.*, 982 F.2d 1043, 1053-54, 1057 (7th Cir. 1992) (enjoining rules dating to 1970 barring networks from buying syndication rights as arbitrary and capricious, since the FCC had earlier recognized that "the rules . . . had outlived their usefulness"; "An administrative agency is no more straightjacketed by its precedent than a court is. It can reject its previous decisions."); *Meredith v. F.C.C*, 809 F.2d 863, 873-74 (D.C. Cir. 1987) (FCC must address, on remand, respondent's argument that Fairness doctrine violated its First Amendment rights, in general and as applied, despite the Supreme Court's upholding of the FCC's Fairness doctrine in *Red Lion v. F.C.C.*, 395 U.S. 367 (1969), because recent FCC report cast grave doubt on the premises of the Fairness doctrine, and remand for resolution of constitutional issue in context of pending enforcement proceeding was thus warranted).

The above cases involved the FCC and had First Amendment overtones, but the courts have also been willing to overturn the decisions of Congress in the context of equal protection/ affirmative action. *E.g., Lamprecht v. F.C.C.*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992) (overturning the FCC's gender-preference policy in the award of broadcast licenses, on

grounds that the FCC failed to show that female-ownership of broadcast licenses affected station programming content and thus contributed to broadcasting diversity; "We know of no support . . . for the proposition that if the constitutionality of a statute depends in part on the existence of certain facts, a court may not review a legislature's judgment that the facts exist. If a legislature could make a statute constitutional by 'finding' that black is white or freedom. slavery, judicial review would be an elaborate farce."). *Cf. Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake")(overturning as violation of First Amendment a statute based on legislative finding that breaches of judicial secrecy posed a "clear and present danger.").

## VII. The Proposed $11,000 Forfeiture Violates the Prohibition in the Eighth Amendment Against Excessive Fines.

The Eighth Amendment[6] prohibits excessive fines. As a government-imposed punishment for the "offense" of broadcasting without a license, the proposed $11,000 forfeiture is a "fine" within the meaning of this constitutional limitation. *See, e.g., Austin v. United States*, 509 U.S. 602, 609-610 (1993); *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989). The $11,000 forfeiture proposed against GR is unlawful because it bears no relationship–and the FCC's hasn't even alleged any–to the gravity of the "offense" of broadcasting without a license. *See, e.g., Austin v. United States*,

[6] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Amdt. 8

509 U.S., at 622-623; *Alexander v. United States*, 509 U.S. 544, 559 (1993). In its most recent pronouncement, the Court emphasized that a forfeiture is unconstitutional if it is grossly disproportionate to the gravity of the offense charged. United States v. Bajakajian, No. 97-1487 (June 22, 1998) (forfeiture of currency was unconstitutional when the offense was merely the failure to report its export). The FCC has not claimed that GR's unlicensed broadcasts have caused any harm. Indeed, the facts demonstrate that GR serves a vital public interest for its audience in Cleveland. The FCC has not sought to contest the beneficial aspects of GRID's activities. The FCC has not claimed that GR has violated any other law, such as facilitating the commission of crimes, obscenity, or unlawful lotteries. Nor has the FCC alleged that the forfeiture serves any other purpose, e.g., remedial or compensatory, other than pure punishment. And, unlike traditional *in rem* civil forfeitures brought against "bad" property, the equipment used by GR may be part and parcel of some offense, but the money sought by the FCC from GR can hardly be said to have committed some crime. *Cf., e.g., Origet v. United States*, 125 U.S. 240, 246 (1888); *Various Items of Personal Property v. United States*, 282 U.S. 577, 581 (1931); *The Palmyra*, 12 Wheat. 1, 13-15 (1827). Just as was the case for the exported currency in *Bajakajian*, it is entirely lawful for GR to broadcast to his audience. All that was needed to export the currency was the filing of a report. Here, all that is needed for GR to broadcast, and to continue broadcasting, is for the FCC to issue a license, which it undeniably has the power–if not the obligation–to do. Accordingly, the proposed $11,000 forfeiture "fine" must be viewed as unconstitutionally excessive because it bears no relationship to the gravity of the offense charged by the CIB.

VIII. Imposition of the Proposed $11,000 Forfeiture Violates the Small Business Regulatory Enforcement Fairness Act.

In recent legislation, Congress has specifically directed agencies to be lenient in enforcement of regulatory compliance against small businesses such as GR. Congress recently enacted the Small Business Regulatory Enforcement Fairness Act of 1996, P.L. 104-121. Congress found, among other problems, that "small businesses bear a disproportionate share of regulatory costs and burdens" and that "fundamental changes that are needed in the regulatory and enforcement of Federal agencies to make agencies more responsive to small business can be made without compromising the statutory mission of the agencies." §§ 202(2), (3). The relevant purposes of SBREFA included creating "a more cooperative regulatory environment among agencies and small businesses that is less punitive and more solution-oriented" and making "Federal regulatory agencies more accountable for their enforcement actions by providing small entities with a meaningful opportunity for redress of excessive enforcement activities." §§ 203(6), (7). Congress required the FCC (subject to certain exclusions not relevant here, for example, "violations that pose serious health, safety, or environmental threats") to provide for the reduction, and under appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement by a small entity." § 223(a). The Commission has not issued rules implementing SBREFA, nor has CIB asked for the necessary factual inquiry to determine whether a reduction or waiver of the proposed forfeiture is appropriate in this case.

Szoka has explained that his "violation" of the Act, if any, is not willful. He believes that he is acting lawfully, and that it is FCC, not GR, that is violating both its statutory

mandate and the First Amendment by attempting to shut down GR and impose an unreasonable and unwarranted forfeiture. Szoka Dcl. at ¶¶ 22, 27.

## IX. The Proposed $11,000 Forfeiture is So Punitive That It Cannot Be Imposed Without Affording Szoka Constitutional Safeguards.

The CIB proposed to punish Szoka as a criminal solely on account of his unlicensed speech. He must therefore be afforded the Constitutional safeguards normally accorded accused criminals. The statutory and regulatory penalties in general, and the $11,000 forfeiture proposed by CIB in particular, are so punitive in purpose and effect that they are either criminal (triggering the full protection of the Fifth through Eighth Amendments and the Federal Rules of Criminal Procedure) or quasi-criminal (triggering at least the application of the Fifth Amendment's ban on self-incrimination to the reporting requirements). *See, e.g., Montana v. Kurth Ranch*, 511 U.S. 767, 128 L.Ed.2d 767; 114 S. Ct. 1937 (1994); *United States v. United States Coin & Currency*, 401 U.S. 715, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1971); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169, 83 S.Ct. 554, 567-568, 9 L.Ed.2d 644 (1963); *Lees v. United States*, 150 U.S. 476, 14 S.Ct. 163, 37 L.Ed. 1150 (1893); *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886).

## X. Conclusion.

The CIB's Motion for Summary Decision should be denied for the reasons set forth above. The Commission's regulatory ban on microbroadcasting is unlawful under both the Act and the Constitution, and cannot form the basis for this enforcement action.

Respectfully submitted,

Hans Bader
Center for Individual Rights
1233 20th Street NW
Suite 300
Washington, DC 20036
202-833-8400

James A. Moody
Suite 600
2300 N. Street N.W.
Washington, DC 20037
202-663-9011

July 28, 1998

## CERTIFICATE OF SERVICE

I, Hans Bader, hereby certify that copies of the OPPOSITION TO MOTION FOR SUMMARY DECISION were served via hand-delivery on this 28th day of July 1998, to the following:

Chief Administrative Law Judge Joseph Chachkin
Federal Communications Commission
2000 L Street, N.W., Suite 226
Washington, D.C. 20554.

Jacqueline Ellington, Esq.
Federal Communications Commission
2025 M Street, NW, Suite 8210
Washington, D.C. 20554.

William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554.
(Original and six copies)

Hans Bader

**EXHIBIT A**

LOUIS N. HIKEN, SBN 45337
Attorney at Law
One Sansome Street, Suite 900
San Francisco, California 94104
Tel:(415)705-6460 Fax:(415)705-6444



**UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| United States of America,<br><br>Plaintiff,<br>v.<br><br>Stephen Paul Dunifer,<br><br>Defendant | No. C 94-3542 CW<br><br>EXHIBIT 2 TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT: AFFIDAVIT OF STEPHEN P. DUNIFER |

# Declaration of Stephen Paul Dunifer

I, Stephen Paul Dunifer, hereby declare:

1. My name is Stephen Paul Dunifer, and I am the defendant in the case of U.S. v. Dunifer, No. C 94-3542, presently pending before this court.

2. I am indigent, and do not have the funds to retain legal support in my efforts to defend myself against the FCC in this action. All of the legal work that has been done on my behalf has been pro bono.

3. After obtaining my first class commercial radio/telephone license in 1969, I worked as a broadcast engineer at numerous television and radio stations. Having embarked on a course of self-study in electronics at the age of 12, I started an electronics design and prototyping business in 1973. Although I have approximately 5 years of college, most of my engineering work has been self-taught. I have worked as a hardware engineer for several computer firms and as a testing consultant to Ziff Davis Labs. I have extensive design and development experience in analog, digital and RF circuit design.

4. Over the past several years, I have been in contact with many individuals who have sought to obtain permission from the FCC to broadcast over microradio transmitters of less than 100 watts. These requests have been uniformly denied by the FCC, and there is no procedure that an individual can follow to get permission from the FCC to broadcast with fewer than 100 watts that permits radio transmissions of more than a hundred yards.

5. In order to comply with the current licensing procedures established by the FCC, it would be impossible for a person without thousands of dollars in financial backing to receive a radio license. I am attaching several articles and letters regarding the failed attempts by such individuals to obtain permission to broadcast from the FCC. There are literally dozens of individuals and groups who have indicated to me that they are prepared to testify at trial in this case and describe to the court the ways in which the FCC has refused to accommodate their desires to broadcast legally.

6. As a result of the litigation in this case, I have been contacted by hundreds of individuals who have attempted to obtain permission to broadcast without having comply with the 100 watt requirement established by the FCC. To my knowledge there has not been one example of the FCC approving such broadcasts, regardless of the fact that some stations exist in rural areas where there are virtually no other stations around, and no conceivable concern about "spectrum scarcity."

7. In spite of the fact that there are numerous unlicensed microradio stations that are broadcasting full-time throughout the nation, the FCC has brought this injunction against me solely because of my vocal opposition to their abuse of their regulatory authority. The FCC has not sought injunctive relief against the following stations, even though some of them have been on the air for years, with FCC knowledge: Mbanna Kantako has been broadcasting for over 5 years, 24-hours/day. San Francisco Liberation Radio has been broadcasting 24-hours day for over a year; KAFR in Arizona, Radio Libre in San Francisco, and dozens of others have all been broadcasting without FCC licenses, with the full knowledge of the FCC. Rather than attempting to accommodate the interests of these stations, the FCC has taken an intransigent position that no waivers or exceptions will be made to their 100 watt minimum requirement, and their financial requirements of extensive engineering studies.

8. The FCC's prohibition against microradio broadcasters is content-related, and is designed to generally prevent the airing of opinions similar to those held by the above-mentioned individuals. Micro radio broadcasters, because they are not sponsored or funded by the government or by corporations, are willing to broadcast information and present perspectives that commercial and even public radio broadcasters will not. The FCC's ban of micro radio is at least partly motivated by the government's desire to keep these alternative perspectives and this alternative information from being available to the public. My own discussions and contacts with the FCC make it obvious that they are specifically attempting to silence me because of my outspoken views regarding the importance of microradio as a new technology providing a vehicle for broader use of the airwaves.

9. In addition to my communication nationally with other broadcasters, I have communicated with people and groups from other nations who are applauding the new technology of microradio as one providing for exciting democratic communications in their nations. I am attaching an article concerning the decision of the government in Colombia to license 1000 community radio stations. I recently traveled to and spoke with President Aristide, of Haiti, concerning the adaptation of our technology to rural communities in Haiti that do not have any other means of access to affordable, simple-to-operate communications systems.

10. I have received requests for my transmitter kits from UNESCO. That international agency intends to adapt them for use in the Philippines, in communities that otherwise would not have access to their own radio stations. I have communicated with Bruce Girard, the director of AMARC, in Canada, who is presently attending an international radio conference in Quito, Ecuador, where the importance of microradio as an inexpensive, efficient system of democratic communications has just been endorsed at the plenary sessions of that meeting. Mr. Girard has indicated that he is prepared to testify on my behalf at a trial concerning the issues presented in this case.

11. I am attaching an article by educator Robert McChesney that has recently appeared in a publication entitled Radio Resister's Bulletin, Issue #13, Winter 1996, published by Frank Haulgren. This article describes the destructive impact that FCC regulations have had on democratic communications in this country, and what the implications of that approach portends for the future use of the computer "superhighway."

12. My attorney and I have communicated with educators Ben Bagdikian and Ed Herman, authors, professors, and specialists in the communications area. They are prepared to testify at my trial that the current regulatory scheme established by the FCC does not serve the "public interest" but instead has rendered the airwaves captive to monopolized commerical broadcasting interests. Public and educational radio has been marginalized, and even those alternatives to the corporate-owned outlets totally fail to address the needs which can be filled by local, microradio stations.

13. There are reasonable alternatives which exist to the current regulatory scheme-especially in rural areas. There are several reasonable alternative ways of allocating spectrum space that will accommodate both the needs of high-watt transmitters as well as microradio transmitters. Even in large cities, there is adequate space to permit microradio stations along with megastations, without fear of interference or "chaos" (politically or technologically).

14. Allegations by the both the FCC and NAB which characterize me as someone who is intent on breaking the law for its own sake and opposed to any sort of regulation are entirely false. For quite some time I have publicly advocated the creation of a low power (1/2 to 50 watts) FM service, a concept entirely rejected by the FCC. Such a service would

be based on relaxed licensing procedures, closer to a registration process rather than full scale licensure. Because the FCC allows such high power levels, 30-50 times the signal strength needed by an average FM receiver in the primary service area, the FM spectrum in the major urban areas has no room left for additional full power stations, in spite of the fact that there are numerous unused channels. This creates pockets which can be filled by micropower FM stations.

15. For example. The frequency used by Free Radio Berkeley is also assigned to a 50,000 watt station in Modesto. Due to the distance the Oakland/Berkeley area does not fall within the primary service area of this station. A full power station could not be put on this frequency in San Francisco due to possible interference with Modesto, however. A micropower station such as Free Radio fits into this pocket efficiently with no possibility of interfering with the primary service area of Modesto due to the low power and antenna position.

16. In the rural, less populated areas of this country the FCC's position can not be justified in any respect. Every small town could have its own community voice for $1000 or less as opposed to the huge sums required under current FCC regulations. Yet, the FCC has refused to even consider this possibility. Instead, it insists that full service broadcasters can somehow best serve these communities. In many cases the population base could not support a full service broadcast entity. They could certainly support a 1/2 watt to 50 watt micropower FM station staffed by community volunteers, however.

17. A regulatory framework could easily be devised (similar to the FCC regulations governing translators) which gives priority to existing and future full power stations. Technology has changed radically since the FCC's 1978 rulemaking procedure which addressed the 100 watt minimum requirement that is still in place today. It is now possible for individuals to operate low power stations with equipment that meets or exceeds FCC standards for stability and signal purity, and for these stations to operate within gaps on the spectrum that are required to separate full power stations, resulting in an overall more efficient use of the spectrum. These 1978 proceedings were the only time the FCC looked at the issue of the 100 watt minimum. The 1978 hearings focused on a problem perceived by the Commission regarding the lack of available spectrum space for new full power non-commercial educational stations, due to the fact that there were currently existing low power stations that were protected from displacement and interference. The Commission decided that a more efficient use of the spectrum would be to move the existing low power stations from the part of the band reserved from non-profit educational stations, to free up this spectrum space for new full power non-profit educational channels. The existing low power stations were moved to open frequencies in the regular commercial portion of the spectrum, and rules regarding the degree to which the low power stations would be protected from future displacement and interference were changed. The FCC also prohibited any future licensing of low power stations, and required that any new station to be licensed operate under the class A restrictions, which include broadcasting with a minimum of 100 watts. They denied reconsideration, with no further analysis, in 1979.

18. These proceedings are insufficient to support the FCC's contention that they have thoroughly considered the issue of micro broadcasting as they are required to do. Nor do the findings of those proceedings support the FCC's conclusion that the ban of micro radio is in the public interest.

a) First, the relevant technology has advanced incredibly in the nearly 20 years since those proceedings. For the first time, micro broadcasting is cheap enough for

an individual of less-than substantial means to go on the air from their garage or home. The equipment now available is capable of operating at or above FCC standards for signal purity and stability. Simply put, micro radio technology, as it exists today, was not remotely considered by the FCC in the 1978 hearings.

b) Secondly, the factual findings of the 1978 hearings do not support the FCC's contention that a total ban of micro radio is in the public interest. Micro radio stations could be licensed and could be granted secondary priority in terms of protection from full power stations. The FCC's position implicitly assumes that they must make a choice between either full power stations, or low power. This is not the case. Even in most densely populated urban areas, there exists available spectrum space in the gaps necessary to separate full power stations from one another for a multitude of micro power stations. A regulatory framework could easily be implemented whereby any and all currently existing and future full power stations retained top priority, and micro broadcasters are relegated to whatever spectrum space remains available.

c) In the 1990 rulemaking proceeding referred to by the FCC in their August 2, 1995 Memorandum and Order upholding their Forfeiture Order against me, only the narrow issue of program origination by translators was before the FCC. The FCC reaffirmed that the appropriate role for translators was to rebroadcast full power programming. The 1993 rulemaking proceedings referred to by the FCC;s August 2, 1995 Memorandum and Order had absolutely no further analysis, only the one-sentence statement that the FCC remained "committed to providing FM radio broadcast service in a manner that promotes program diversity while enhancing the incentives for efficient full-service broadcast station development." Determining the proper role for translators is a separate and distinct question from whether permitting micro broadcasting is feasible. None of the hundreds of micro broadcasters now on the air took part in the 1990 or 1993 proceedings regarding translators. Furthermore, even in the three years that have elapsed since the last translator hearings, micro radio technology has advanced a great deal in terms of affordability and signal purity and stability. At the present time a 5-10 watt micropower transmitter meeting all basic FCC requirements could be produced in volume and sold for about $200.00 or less.

19. The following assertions are made in response to the Memorandum and Order issued by the FCC denying my request that they set aside the Forfeiture Order:

a) Co-channel operation need not be permitted in order to allow some microbroadcasters to go on the air.

b) Spurious emissions and harmonics are less of a problem with micropower broadcasters than full power broadcasters due to the much weaker signal. Proper design, configuration, equipment and setup eliminate these problems. Although not tested by a compliance lab, equipment used by FRB has been examined with appropriate test equipment which indicates good signal quality and frequency stability

c) For several years the FCC has been boasting of its ability to track and identify, and locate signals without any difficulty. A major budget item was the acquisition of 70-80 new vehicles with the latest tracking gear including Global Position Satellite receivers for precision mapping and targeting of signals.

d) Even under the FCC's definition of "efficiency," the most efficient use of the spectrum would be a combination of low power and full power stations. Full power

stations require a buffer zone of spectrum space around them. In the Bay area, no additional full power stations can be added, yet there are still approximately ten slots in between the existing stations that are suitable for micro broadcasts that would not cause interference with the licensed stations. A regulatory framework could be established whereby micro stations would be licensed to use these gaps in the spectrum, without needing to be granted full protection from fullpower stations' interference. Current examples of this exist in the Bay area and throughout the country. There have been no reports of interference with full power stations.

e) Since the cost of putting a micropower broadcast station on the air can be $1000 or less and maintained with an entirely volunteer staff, the cost/benefit ratio is actually very high. In the case of FRB, for example, the potential audience is at least 250,000 people. With about a $2000 station investment that works out to less than 1 cent per potential listener.

f) We are not contending that the FCC must permit unlicensed broadcasts, only that a less restrictive regulatory framework is feasible that would permit micro broadcasting. Canada's licensing scheme entails filling out a one page form and paying a small fee, while the FCC's current application requires expert legal assistance to complete, and entails a filing fee of thousands of dollars, not including the expense involved in retaining the necessary legal and technical assistance; and even this process is unavailable to micro broadcasters, who cannot obtain a license under any circumstances at all.

g) First amendment expression and the principles of democratic communications stand to benefit greatly from micropower broadcasting technology. Clearly, the FCC, working from a top down hierarchic viewpoint, has done everything within its power to bring about a closure of first amendment activity with a regulatory structure which only allows the wealthy and powerful to have a voice.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on December 22, 1995.

Stephen Paul Dunifer

## ATTACHMENTS TO DECLARATION OF STEPHEN DUNIFER

Attachment A -

Letter from Attorney Victor Aranow, Attorney for station DAFR, in Phoenix, Arizona.

Attachment B -

Copy of NAL issued by FCC against Radio Concorde, and response of Pierre Brutus, speaking on behalf of Haitian Community Broadcast station in New York City; copy of letter from Pierre Brutus to the FCC.

Attachment C -

Article from Radio Resister's Bulletin, Issue #13, Winter 1996, Edited by Frank Haulgren concerning efforts of microradio station "Excellent Radio" to obtain waiver and permission from the FCC to engage in legal microradio broadcasting.

Attachment D -

Email from microradio station in the state of Washington regarding circumstances of broadcasting, and reasons for anonymity.

Attachment E -

Email regarding establishment of Community Radio stations in Colombia.

Attachment F -

Article published in Radio Resistor's Bulletin, Issue #13, Winter 1996, reprinted from In These Times, July 10, 1995, written by Robert W. McChesney, concerning the lack of community access to the means of communication.

# ATTACHMENT A
# TO DECLARATION OF STEPHEN DUNIFER

**VICTOR ARONOW**
P.O. Box 3436
Phoenix, Az. 85030
(602) 829-1520

November 20, 1994

Office of the Commissioner
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: Station KAFR operated by William Dougan

Dear Sir:

I am writing to inform you that my client William Dougan will begin operating an FM station in Phoenix, Arizona on or after December 1, 1994 with call letters KAFR. He will be operating a BEXT P2 transmitter, which meets or exceeds all FCC requirements with regard to spurious harmonic suppression and modulation capability. His power output will be 1.7W. He will be broadcasting at a frequency of 90.7 mHz He has finished testing the equipment, and there is no interference with the two nearest station frequencies occupied by KJZZ and KFLR. There is no interference with television reception in the broadcast area.

As you are aware, the FCC has no licensing authority by statute or regulation for stations under 100 watts, therefore, my client does not need to, and does not intend to, apply for any license to operate his station. If you have reason to believe that the operation of this station is subject to FCC regulation, please let me know the basis for your claim within ten (10) days. If I do not hear from you by that time, my client will assume that you acknowledge that you have no regulatory authority for this station, and he will begin broadcasting.

Thank you.

Sincerely,

Victor Aronow

# ATTACHMENT B
# TO DECLARATION OF STEPHEN DUNIFER

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Mr. Pierre Brutus | ) | |
| DBA Radio Concorde | ) | NAL/Acct. No. 415NY0028 |
| Hollis, NY | ) | |
| | ) | |

NOTICE OF APPARENT LIABILITY

Released: June 29, 1994

By the Field Operations Bureau:

## I. Introduction

1. This is a **Notice of Apparent Liability for Monetary Forfeiture** issued Pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC § 503(b), to Mr. Pierre Brutus, DBA Radio Concorde, for willful violation of Section 301 of the Communications Act, 47 USC § 301. On June 28, 1994, Mr. Pierre Brutus, DBA Radio Concorde, operated a radio station on 87.5 MHz without benefit of a radio station authorization to operate on this frequency.

2. The appropriate amount of forfeiture for this violation is $15,200.

## II. Background

3. A confidential informant advised this office that transmissions from an FM broadcast station was causing harmful interference to television reception on TV Channels 5 and 7.

4. On June 23, 1994, in response to this report, an Agent from of the New York office, observed transmissions on 87.5 MHz.

5. A second confidential informant advised this office that the transmissions on 87.5 MHz is Radio Concorde and is being operated by Mr. Pierre Brutus.

6. On June 24, 1994, Mr. Pierre Brutus was interviewed by telephone by a Commission Agent. Mr. Brutus admitted that he was operating an FM broadcast station on 87.5 MHz.

7. During the telephone interview on June 24, 1994, an Agent of the New York office advised Mr. Pierre Brutus of the licensing requirements provided in Section 301 of the Communications Act, and warned him of the penalties provided for operating a radio station without benefit of a radio station authorization.

8. The second confidential informant advised this office that Radio Concorde continued to operate his FM broadcast station on the nights of June 24, 25, 26, and 27, 1994.

9. On June 28, 1994, a Commission Agent again observed transmissions on 87.5 MHz, and using Mobile Automatic Direction Finding equipment determined that the transmission were emanating from 89-43 198th Street, Hollis, NY, the home of Mr. Pierre Brutus.

10. On June 28, 1994, the Commission Agent measured the field strength of the signal on 87.5 MHz and determined that the level exceeded the radiation emission limits for intentional radiators provided in Section 15.209 of the Commission's Rules and Regulations, § 47 CFR 15.209.

11. On June 28, 1994, a Commission Agent inspected the FM broadcast station at the home of Pierre Brutus.

12. The station was using an FM exciter tuned to 87.5 MHz, and operating with 25 watts of carrier power into an antenna located in the back yard.

13. Mr. Brutus was unable to produce a radio station authorization, however he showed the Commission Agent a letter dated August 10, 1992, that he wrote to the to the FCC's central office in Washington, DC requesting licensing information. On September 1, 1992, the Commission provided Mr. Brutus with information on how to obtain a broadcast station license.

14. There is no Commission record of a radio station license issued to, or a radio station license application from, Mr. Pierre Brutus to operate an FM broadcast radio transmitter on 87.5 MHz.

## III. Discussion and Conclusions

15. Mr. Pierre Brutus, DBA Radio Concorde, violated Section 301 of the Communications Act on June 28, 1994.

16. The violation was willful.

17. Pursuant to our Policy Statement, Standards for Assessing Forfeitures, 8 FCC Rcd 6215 (1993), the base forfeiture amount for operating an unlicensed radio station is $8,000. Because Mr. Brutus had full knowledge of the Commission's requirements in how to obtain a radio station license, we are adjusting the amount upward to $15,200. No further adjustments appear warranted. Accordingly, we are setting the apparent liability at $15,200.

## IV. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED**, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC § 503(b), and Section 1.80 of the Commission's Rules, 47 CFR § 1.80, that Mr. Pierre Brutus, DBA Radio Concorde, **IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE** in the amount of $15,200 for operating a radio station without benefit of a radio station license, in

FEDERAL COMMUNICATIONS COMMISSION
201 Varick Street
New York, NY 10014-4870

Att. : NAL/Acct. No.415NY0028

I have received your letter written on June,29,1994 and have read it with lot of interest.

I did not wilfully violate Section 301 of the Communication. I operated " Radio Concorde" on a non-profit basis.That was a Radio serving the haitian Community of Queens Village. The goal was to educate, Culturally and Spiritually the haitians living in the area. I did it because I believed that this kind of service was useful to any Community since there was anything like that for the haitians of Queens Village.That was a way to keep the teenagers at home not in the street.
I did not know that I was violating any law. I did rather believe that the letter I received would have allowed me to test the air while waiting to apply for the licence.
I used all of my savings to buy equipments to be able to provide that service because it was my dream to make a difference with the haitian Community. That difference is to teach the youth to grow up to be good to each other and to respect everything in their Community.
In addition. I was about to provide for the elder some courses in English. Their problems are that they can not find any work because they don't speak English.
That was the goal of Radio Concorde.It was to help my people make a better living through education. That was to teach them to be responsible not to depend on the Government to provide for them.
That was the message I had through music, love, and the word of God. I do not have anything I used all my assets to buy equipments. If I knew that I was breaking the law, I would not buy any equipment.
If I have caused any harm it's because I did not know and I apologize.

Sincerely

Pierre Brutus.